

# Practice and Teaching

## Commodity and Maritime Arbitration in London: How the Grain Trade Approaches the Problem

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### INTRODUCTION

This article concerns contracts for the international sale of goods governed by English law, with an arbitration clause providing that the forum is London. Most commodity and maritime arbitrations arise from the use of standard form contracts. London is the home of a number of commodity trading associations that produce standard form contracts. An example is the Grain and Feed Trade Association (GAFTA). There are others but we will concentrate on GAFTA as the largest. Most bulk commodities are carried by sea and therefore a contract of carriage will come into existence. These maritime contracts, such as charterparties and bills of lading, are also available in standard form, many being approved for use by the Baltic and International Maritime Council (BIMCO) based in Denmark. GAFTA offers its members a standard charterparty as well as sale contracts.

While it is possible to trade on standard forms in their unamended state, the general practice is to use a specific or special contract that contains a phrase such as 'otherwise as per GAFTA Standard form no . . .' This effectively fills any gaps the parties may have in their agreement. On the maritime side, the practice is to make a number of amendments to the standard form to produce the final agreement. We shall look at how trading or commercial disputes, as opposed to salvage or collision matters, can be dealt with.

### WHY IS ARBITRATION USED?

As a trade association, GAFTA can trace its roots back a considerable way. The trading companies which are the principal members of GAFTA have,

historically, sought to resolve their differences amicably rather than through the courts. Where amicable settlement proved impossible, rules for settlement by arbitration evolved, where trading companies looked to one of their peers, generally an experienced trader in another organisation, for a quick resolution. One benefit of arbitration is privacy. Commercial disputes can be resolved without news of them being broadcast in the marketplace. Trading companies also looked to arbitration for a speedy and cost-effective solution, for example by discouraging the use of lawyers.

Trading companies are the reason why the shipping industry exists. It is the profit made from buying and selling cargoes that pays the shipowner for carriage of the contractual goods, the cargo underwriter for insuring them, and the banks that finance the operation. Commodity trading is trading under pressure, particularly pressure of time. It is probably due to this pressure that certain obligations under the contract are not sufficiently covered at the time that the contract is finalised. The movement of goods by sea is always fascinating and varied, with the unexpected liable to occur without notice. Other people's wars, strikes, fires, theft, fraud and piracy are just some of the everyday problems. Delays both at sea and in port cause losses both to the trader and the shipowner. Damage, howsoever caused, can result in delay. A buyer may refuse to take delivery of goods that have arrived 'not as per contract'. Damages in the commodity business can be very high indeed. The very nature of the commodity business, that is international sales, means that there are (and will be for the foreseeable future) many disputes that

need to be arbitrated. Arbitration is considered a normal part of trading life. This has the advantage of creating a climate where disputes are, in the main, resolved without damaging continuing trade between the parties.

Trading companies therefore need a system of arbitration that is quick, reasonable, effective and available at a cost that is not prohibitive. GAFTA, as perhaps the leading and most active international trading association, has developed this service. London is not the only centre for arbitration but we are concentrating on contracts where the parties have agreed to English law and jurisdiction. London has the well-established and respected London Maritime Arbitrators Association (LMAA), but that body does not administer arbitrations itself. For the trading companies the beauty of using trade associations such as GAFTA is that they provide a secretariat that administers the arbitration process in accordance with known rules. Complaints about delays, or anything else for that matter, can be addressed to GAFTA. If justified, GAFTA can take sanctions against the arbitrators concerned. This, as they say, 'concentrates the mind wonderfully'.

## **THE PARTIES TO A COMMODITY ARBITRATION**

In a sale contract one party is buyer and the other seller. Because they are traders, the buyer will be selling the cargo on (trading on) and probably be involved in a similar arbitration where it will take the position of seller towards its buyer. This trading on of the cargo leads to a string of parties and to 'string arbitrations', where the dispute is handed on 'down the string'. To avoid unnecessary duplication and expense, rules have been developed. GAFTA Arbitration Rules, known as GAFTA 125, apply. Rule 7 provides:

### **STRING ARBITRATIONS—CONSOLIDATED ARBITRATIONS AND CONCURRENT HEARINGS**

#### **7:1 Quality and Condition**

If a contract forms part of a string of contracts which contain materially identical terms (albeit that the price may vary under each contract), a single arbitration determining a dispute as to quality and/or condition may be held between the first seller and the last buyer in the string as though they were parties who had contracted with each other.

Any award made in such proceedings shall, subject only to any right of appeal pursuant to Rule 10, be binding on all the parties in the string and may be enforced by an intermediate party against his immediate contracting party as though a separate award had been made pursuant to each contract.

#### **7:2 Other Cases**

In all other cases, if all parties concerned expressly agree, the tribunal may conduct arbitral proceedings concurrently with other arbitral proceedings, and, in particular, concurrent hearings may be held, but separate awards shall be made pursuant to each contract.

Because the seller has to enter into a contract of carriage, there is a contractual relationship under the maritime contract with the shipowner. It is now possible for disputes under maritime contracts to be handled by GAFTA.

## **REPRESENTATIVES**

While many large trading companies have specialist departments, such a luxury is not available to all. While parties can, and do, instruct lawyers to prepare their cases, the grain trade discourages the use of lawyers at any oral hearings. The intention is to have commercial disputes resolved by commercial people. GAFTA, on behalf of the trade, attempts to keep a check on the cost element with rules that prevent lawyers from presenting cases in arbitration hearings unless both parties agree. This does not prevent any party from using a lawyer to prepare its case, but it limits the recovery of costs. GAFTA 125 Rule 16 covers the appointment of lawyers and 16:2 the recovery of their fees:

### **LEGAL REPRESENTATION AND COSTS**

16:1 The parties may expressly agree that they may engage legal representatives (i.e. solicitors, and/or a barrister and/or other legally qualified advocate or advisor wholly or principally engaged in private practice) to represent them in the arbitration and/or in any appeal proceedings and to appear on their behalf at any oral hearings.

16:2 Where there is no such agreement between the parties they are nevertheless free to engage legal representatives to represent them in written proceedings but not to appear on their behalf at oral hearings. The costs of engaging legal representatives in such circumstances shall not be recoverable unless the tribunal considers that such costs were reasonably

incurred. This provision shall not apply to single track arbitrations pursuant to Rule 17.

Where only one party is legally represented, legal costs are not recoverable 'unless at the discretion of the arbitrators'.

A party can prepare its own case, or use a trade representative, someone with knowledge of the trade in question, who has probably acted as arbitrator and is therefore experienced in the process, and willing to act. Once involved in a dispute as arbitrator, the rules of GAFTA prevent that person from acting as trade representative if the case is taken to the Board of Appeal.

If one party does not agree to legal representation at any oral hearing, then both parties are limited either to attending in person or to appointing a trade representative.

Expert witnesses can attend but most often their evidence is by written report. Because trade arbitrators are drawn from the ranks of the trade and have detailed knowledge of the trade, the need for expert witnesses is reduced.

### **ARBITRATORS' QUALIFICATIONS: HOW ARE THEY OBTAINED?**

Trade arbitrators are drawn from the ranks of trading companies, most of which allow anyone who satisfies their requirements to become a trade arbitrator. I am not aware of any trade association that insists on a formal interview before accepting anyone as an arbitrator. For example, to become a GAFTA qualified arbitrator a person must be either an individual member of GAFTA, or, with the permission of their employer, an employee of a member. They must also meet the requirements of the GAFTA Continuing Professional Development Programme (CPDP), i.e. they must complete the Grade 2 section of the CPDP, earn 75 CPD points and successfully complete all elements of the GAFTA Trade Diploma. The applicant must also have ten years' experience in the trade. This requirement is essential in providing commercial arbitrators with knowledge and experience. There are a limited number of exemptions available but it is generally felt in the trade that it is the 'years served' that bring most value to the role of the arbitrator.

The CPDP course does provide some legal background but trading companies are looking for quick

and economical commercial resolutions and not the equivalent of the judgment of a court. Arbitrators must, of course, have a grounding in law and the CPDP aims to provide this.

In GAFTA, membership of the Chartered Institute of Arbitrators is unusual and this is something that perhaps the Institute should be examining.

### **WHO APPOINTS THE ARBITRATORS?**

Under the Rules of GAFTA each party may nominate an arbitrator and GAFTA will then appoint the chair and complete the tribunal. The parties may agree upon a sole arbitrator, or apply to GAFTA for the appointment of a sole arbitrator. GAFTA arbitration is a two-tier system and the parties have the right of appeal to a GAFTA Board of Appeal but then have nothing to do with the appointment of its members.

If the appeal is from the award of a sole arbitrator, the Board of Appeal has three members; if from a tribunal of three, the Board of Appeal has five members. Where one party refuses to act or reply, GAFTA will, on the request of the other party, nominate an arbitrator to complete the tribunal.

### **WHO PAYS THE ARBITRATORS?**

GAFTA's arbitration department acts as the secretariat and administers the system, charging the parties the costs of the arbitration. The Rules permit GAFTA to request payment in advance of a deposit to cover the administrative costs and allow the tribunal to call for a deposit in respect of arbitrators' fees.

Following the decision of the tribunal, GAFTA announces that the award is ready for collection on payment of a fee. There is a difference between the fee charged to members and to non-members. On payment of that final fee the award may be picked up.

Security for legal costs is covered by GAFTA 125 Rule 16. It would appear that GAFTA arbitrators do not have the power to make an order for the provision of security for legal costs, particularly when there has been no agreement on the use of legal representatives. But GAFTA has an effective lien over the award, which it will not issue until costs and fees have been paid.

GAFTA, and the trade in general, are aware of

the need to keep the provision of an arbitration service cost-effective. Arbitrators' fees are often discussed at GAFTA Arbitration Committee meetings. This committee is a users' committee, responsible for making sure that the requirements of the trade are met. Fees are kept under scrutiny and are not allowed to run away.

### **THE GAFTA PROCESS AND INTERLOCUTORY PROCEEDINGS**

There is no set procedure for GAFTA arbitrations, although appeals tend to be more formal than first-tier arbitrations. To assist the trade, GAFTA has produced the *GAFTA A-Z of Arbitration*. This is a guide for users but is also aimed at the legal profession. For example, under the heading of 'Drafting of Submissions', it is made clear that the purpose of submissions is for each party to state and explain its case and that submissions should be written in plain, clear language. There is also a note to lawyers reminding them that submissions are not pleadings; the formal rules of pleadings do not apply and, unlike pleadings, submissions should refer not only to matters of fact but also to matters of evidence and law.

Arbitration procedure is covered by GAFTA 125 Rule 4. Rules 4:5 and 4:6 provide that the tribunal can vary the procedure to ensure that each party has a reasonable opportunity of putting its case and dealing with that of its opponent. Rule 4:6 stresses the duty of the tribunal to ensure prompt progress, including the making of orders where appropriate. Rules 4:5 and 4:6 are reflections of the Arbitration Act 1996 s33. Orders for discovery, or for directions or, where there has been no progress, peremptory orders are all explained in the *A-Z*.

#### **Documents only**

The majority of GAFTA cases are dealt with on a documents only basis, with the arbitrators meeting to discuss the reference as required. When they are satisfied that the matter has been fully discussed, the chair will advise the parties that the submissions are closed and that the tribunal is moving to issue its award.

#### **Hearings**

It is unusual but not unknown for there to be an oral hearing at the first tier. It is more common before the Board of Appeal. By their nature appeals tend to be

more formal but efforts are made to keep the level of formality to a minimum. The usual practice is for the case to be presented by a trade representative but, if the parties agree, lawyers can represent them.

### **CONCLUSIONS**

GAFTA has been used as a leading example of commodity trade arbitrations and much of what has been said for GAFTA will apply to other associations. The most important point to note is that the trade looks for real experience in its arbitrators, and by real experience I mean the experience of living or dying by a commercial contract. Real experience of the commercial world is essential and GAFTA has experienced arbitrators available who have a knowledge and understanding, not only of sale contracts, but also of all the collateral contracts that come about because of the international sale of goods carried by sea, including charterparties, bills of lading, letters of credit, insurance (both marine and liability) and others, including special financing arrangements. There must be commercial sense in having arbitrations for disputes, arising from sale contracts and the collateral contracts, handled by one secretariat with access to a known band of commercial people with real experience of the commercial world.

GAFTA has a small claims procedure under the Simple Dispute Arbitration Rules, Form 126 (GAFTA 126). Parties who agree to this process sign an agreement that GAFTA 126 shall apply in place of GAFTA 125 and that there will be no appeal either to the GAFTA Board of Appeal or the High Court. GAFTA has also created a set of Maritime Arbitration Rules known as GAFTA 127, which provides a single-tier system but does not prohibit parties appealing to the High Court if they wish.

The GAFTA arbitration service has expanded to cover arbitrations for the London Rice Brokers Association and has handled other commodities from time to time. The possibility of handling maritime arbitrations is a further expansion of this service to the commodity trades, which need not be limited to the grain and rice trade. This is a further response to the increasing need for arbitration and the fact that in this continuing evolution London remains a leading light. With evolution in mind GAFTA is now working on a set of mediation rules that will be known as GAFTA 128.